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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The specially constituted District Court wrote no opinion. Its findings of fact and conclusions of law (R. 1169) are not reported. The report of the Commission (R. 17) is reported in 160 I. C. C. 369. The Commission's order is contained in a supplemental report (R. 97) reported in 165 I. C. C. 495.

JURISDICTION

The decree of the District Court was entered January 29, 1931. (R. 1174.) The petition for appeal was filed January 29, 1931 (R. 1176) and was allowed the same day. (R. 1179.)

The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

The question presented is whether the Commission's order is supported by evidence and is reasonable, nondiscriminatory and nonconfiscatory.

STATUTE INVOLVED

The Interstate Commerce Act, as amended, provides in part:

> SEC. 1 (10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.
>
> (11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and

unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for

transportation, and be subject to any or all of the provisions of this Act relating thereto.

(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. (c. 91, 41 Stat. 476; U. S. C., Title 49, Sec. 1 (10)–(14).)

STATEMENT

This suit was brought in the United States District Court for the Northern District of Illinois by appellants, twelve common carriers subject to the Interstate Commerce Act, on behalf of themselves and other carriers similarly situated, to set aside parts of an order of the Interstate Commerce Commission entered July 15, 1930. (R. 1.) The Commission's order was entered in a proceeding commenced by the Commission on its own motion, following complaints principally from the American Short Line Railroad Association, for the purpose of investigating generally the rules and practices then in force among railroads throughout the United States for the settlement of car hire charges, i. e., charges for the use and detention of freight cars while on the lines of common carriers other than

their owners.[1] (R. 20.) The collection of these charges has for some time been governed by rules adopted by vote of railroads which are members of the American Railroad Association, a voluntary association of railroads hereinafter referred to as the A. R. A. The Commission's order to some extent revises and supplements these rules. (R. 99–100.) The portions of the order that are attacked are said to be unsupported by evidence and to be unreasonable and confiscatory, in violation of the Fifth Amendment to the Constitution.

All common-carrier railroads in the United States were made parties to the Commission's proceeding and hearings were held in various cities. (R. 4, 5, 6.) Testimony was presented to the Commission on behalf of short-line railroads by the American Short Line Railroad Association. (R. 21.) In addition, about 141 individual short-line railroads submitted evidence. The A. R. A. offered evidence in support of the existing rules. At the Commission's request, transportation officials of fifteen trunk-line carriers appeared, primarily to explain departures from the rules. A record was made up, consisting of some five thousand pages of testimony and over five hundred exhibits.

Originally, freight cars did not leave the owners' lines, but freight was transferred at junction points

[1] Together with the main proceeding before the Commission, there were consolidated a number of individual car-hire cases (R. 20–21), none of which, however, is separately involved in this appeal.

to cars of the connecting carriers. *In the Matter of Car Shortage,* 12 I. C. C. 561, 573. To economize in time and expense, and particularly to improve the service, the practice arose, instead of reloading cars at junction points, of permitting the loaded cars to pass on to the tracks of connecting carriers. (R. 152–53.) Similarly, the desire to obtain traffic led car-owning roads to supply empty cars to connecting roads to be filled and returned over the roads of the car owners. (R. 153.)

In 1911 the Commission decided that the Interstate Commerce Act, as amended, rendered compulsory the interchange of equipment among railroads subject to the Act, and that carriers could not refuse to permit freight equipment to pass onto the rails of connecting carriers. *Mo. and Ill. Coal Co. v. Ill. Cent. R. R. Co.,* 22 I. C. C. 39. Under the Esch Car Service Act of May 29, 1917 (40 Stat. 101), as amended and reenacted by the Transportation Act, 1920, the Commission is authorized to require car service rules to be filed with it the same as tariff schedules. (Section 1 (13), *supra,* pp. 3–4.) But this authority has not thus far been exercised. (R. 4.)

The practice of collecting car-hire charges developed in the late sixties, but prior to 1902 no uniform method of determining a proper car-hire charge and of collecting it prevailed. (R. 140–1.) Before that date, car-hire compensation was usually computed on a mileage basis. (R. 140.) In exceptional instances a per diem or a combined

mileage and per diem basis was employed. (R. 140.) The mileage basis proved undesirable because the owner could not check the distance its cars travelled when on foreign lines and because it provided no incentive to return cars promptly. (R. 194, 907, 23.) In 1902 when the A. R. A. promulgated the Code of Per Diem Rules containing uniform rules governing the exchange of freight equipment, the per diem basis of paying for the hire of exchanged equipment was adopted.

To make the code binding, carriers subscribed to the Per Diem Agreement whereby they agreed to abide by and enforce the rules contained in the code. (R. 194, 975, 24.) Only common-carrier railroads were permitted to sign the agreement. (R. 902, 24.) An agreement substantially similar to that first used is still in force, with some provisions added. (R. 24.) Subscribers to the present agreement, in addition to agreeing to abide by the per diem rules, agree to adopt certain "car service rules" which have been incorporated by reference into the per diem code in rules 3 and 19. (R. 1068, pp. 7 and 50.) They also authorize the Car Service Division, with headquarters at Washington, to act for them in all car service matters and to be their agent for service of orders and regulations under the car service provisions of the Interstate Commerce Act. (R. 24.) Subscribers are required to be equipped with adequate motive power. (R. 4, 24.) They must be members of the Bureau for the Safe Transportation of Explosives and Other

Dangerous Articles, and parties to the M. C. B. Interchange Agreement, and must put in force the National Car Demurrage Rules. (R. 24–25, 194.) A subscription application must be approved by at least two-thirds of the lines connecting with the applicant's road. (R. 194.) A subscriber must also be a member or associate member of the A. R. A. (R. 194.)

Only carriers operating more than one hundred miles of road are eligible to become members of the A. R. A. (R. 25.) Each thousand miles of road or fraction thereof operated entitles the railroad to one membership in the A. R. A.; and each membership entitles the road to one vote in the adoption or revision of the per diem rules. (R. 161, 25.) Appellants are all A. R. A. members and subscribers to the per diem agreement. (R. 4.)

Carriers operating less than a hundred miles of road can become associate members of the A. R. A. (R. 25.) Associate members have no voting rights whatsoever. (R. 154, 161, 219, 25.) They share in the expense of the A. R. A., paying $40 annual dues. (R. 667, 670.) They are required to agree to abide by the rules and regulations of the A. R. A., but have no representation on the A. R. A. committees which interpret and apply the rules. (R. 25, 193; Rule 1, R. 1068, p. 46.) It is clear, then, that the short lines have no voice in the adoption, revision, or application of the rules. Such powers rest solely with the trunk lines. The vote of a majority of the memberships, representing

two-thirds of the freight cars owned or controlled by subscribers, is necessary for the adoption of new rules. (R. 26.) Since eight roads own more than one-third of the freight cars owned by all subscribers, those roads could prevent any change in the rules. (R. 219–220.) One of the demands made by the short lines in this proceeding, which the Commission did not grant, was that the short lines be given representation on the committees which make and interpret the per diem and car service rules. (R. 139.)

A. R. A. members and associate members, all subscribers to the per diem agreement, include 1347 out of 1731, or 77.81 per cent of all steam railroads in the United States, operating 97.79 per cent of all railroad mileage, and owning 99.81 per cent of the interchangeable freight equipment owned by all railroad common carriers. (R. 194, 893, 1066.) All Class I and nearly all Class II railroads are subscribers. Most of the nonsubscribers are Class III roads. (R. 196.)

The per diem code showing the original and amended per diem rules is printed in full in the record at page 1068. Car-hire charges are made payable at a per diem rate of $1.00 per car, that amount having been increased gradually from the 20-cent rate in effect at the time the per diem rules were first promulgated. (Rule 1, Code p. 5; R. 157–158.) The per diem rate is supposed to represent the average cost, to the owner, of freight car cost and maintenance, including cost of repairs,

taxes, replacements, miscellaneous expenses, and a return of 6 per cent on the investment. (R. 26, 222, 226.)

Car days are reckoned by charging the road having a car in its possession at midnight with the rental for the following day. (Rule 2, Code p. 5.) Thus, no car hire is paid on cars received after midnight and passed on before the following midnight. That situation occurs principally in the case of trunk lines, and only in exceptional instances in the case of short lines, due to the fact that only the former ordinarily have an overhead traffic, that is, receive cars from one carrier for delivery to another. (R. 148, 806.)

The mechanics of reporting and accounting for car hire are provided for in Rules 9 to 12, inclusive. Daily Interchange Reports are required to be made, recording all cars interchanged between subscribers, these reports being transmitted by the delivering to the receiving carriers for verification. (Rule 9, Code, pp. 17–18.) The delivering carriers also transmit daily Junction Reports to the car owners notifying the latter of all interchanges with subscribers effected during the day. The owners thereafter look to the receiving subscriber roads for the per diem until notified that further interchanges have been effected. (Rule 10, Code, p. 18.) No report to the car owner is required when a car is interchanged with a nonsubscriber. (Rule 6(a), *infra*, p. 12.) Subscriber car users are also required to render monthly reports to the various car owners,

and monthly settlements are made on the basis of these reports. (Rules 11, 12, Code, pp. 24–25, 26.) Under Rule 4 every subscriber to the per diem agreement is required to make reports to, keep accounts, and settle with each subscriber owner of cars handled by it, whether in road or in switching service. (Code, p. 7.)

Rule 5 provides for so-called switching reclaims. (Code, pp. 7–11.) When the per diem rules were promulgated a number of trunk lines, which performed a large volume of switching, refused to subscribe to the per diem agreement upon the ground that existing switching charges did not permit payment of the full per diem rental on cars used in switching service. (R. 142.) It was regarded as impractical to increase switching charges throughout the country to render possible the absorption of the car rental. (R. 142, 158.) In order, therefore, to induce trunk lines performing switching service to adopt the per diem code, a compromise was reached whereby subscribing carriers performing a switching service pay the full per diem on cars of other carriers which they switch, but reclaim the average cost to them of per diem charges on such cars from the line haul carriers for which the switching is done. (R. 142, 143, 1068, Code, pp. 7–11.)

A code of rules governing switching reclaims[2] has been established and made a part of the per

[2] Switching reclaims are of importance principally in connection with terminal switching as defined in the Code.

diem code by incorporation by reference in Rule 5. (R. 200, 215, Code, pp. 11, 56–67.) The switching reclaim rules are not mandatory as between subscribers, who are free to enter into special agreements with each other according to the needs of peculiar local conditions. (R. 143, 196, 203.)

Paragraph (e) of Rule 5 provides that no reclaims shall be allowed to nonsubscribers. (Code, p. 8.) Rule 6, as amended in 1922, provides (Code, p. 12):

> (a) In case a subscriber delivers a car of any subscriber to a nonsubscriber it shall be responsible to the owner for the per diem accruing on the car while on such nonsubscriber road. The owner will accept settlement for the use of the car only from the delivering subscriber, which shall make settlement with the nonsubscriber in accordance with paragraph (b) of this rule.
>
> (b) Subscriber roads shall make settlement with their nonsubscriber common carrier connections (other than roads which have been declared industrial common carriers) at the established per diem rate, without any free time allowance and without reclaim.

Rule 18 renders the per diem rules inapplicable to cars of nonsubscribers. (Code, p. 47.) By resolution supplementary to Rule 18, subscribers have agreed to pay nonsubscribers for the use of the latter's cars on a mileage instead of a per diem

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(Code, p. 60; R. 199, 200, 203.) Of two other kinds of switching, intermediate and interterminal, only one day's reclaim is now given for the former and none at all for the latter. (Code, pp. 10, 62; R. 164, 198, 398.)

basis. (R. 46, 667.) The obvious and admitted purpose of these provisions discriminating against nonsubscribers is to induce or compel subscriptions to the per diem agreement. (R. 195, 666, 840, 850, 901, 903.) Per diem costs may exceed the total switching charges collected, thus rendering switching operations unprofitable unless reclaim is received. (R. 710, 742.) The Commission found that the effect of paying for the use of nonsubscribers' cars on a mileage basis was to give nonsubscribers an average of 50 cents per car day, whereas the per diem code provides for a per diem payment of $1.00 for the use of subscribers' cars by either subscribers or nonsubscribers. (R. 46.) The hire of private cars is paid for on a mileage basis, but the use of private cars is restricted to transportation of such shipments as owners may designate. Nonsubscribers' cars are ordinarily general-service cars, the same as those of subscribers.

Since short lines operating less than 100 miles of road have no voice in the adoption or revision of the per diem rules (*supra*, p. 8), to require them to subscribe to the per diem agreement is, in effect, to require them to take what the trunk lines are willing to give them. Furthermore, the cost of accounting for car hire to all car owners individually as is required of subscribers is prohibitive so far as many short lines are concerned; they can not on that account afford to become subscribers. (R. 511, 660, 715, 711, 717, 47, 48.)

The Commission in its report in this case, after reviewing the evidence, made certain formal findings. (R. 92, 93.) The Commission found that car owners are entitled to collect a reasonable car hire charge, and that $1.00 per car day is such a reasonable charge. The Commission found further that those provisions of the per diem code which discriminate against nonsubscribers are unreasonable, and should be removed by providing (1) for the payment of the same daily car rental charges to nonsubscribers as are paid to subscribers, and (2) for the allowance of switching reclaims on equal terms to both nonsubscribers and subscribers.

The Commission approved the general method of accounting for car hire embodied in the per diem rules, but found it to be uneconomical and unreasonable to require short lines, less than a hundred miles in length, which return equipment to the road from which it is received, to report and account to the numerous car owners throughout the country. Such lines, the Commission found, should be attached to their connecting carriers for the purpose of car hire settlement. In addition, it was found that the same short lines should be allowed an average of two days' free time per loaded freight car interchanged, and that no car hire should be paid by such lines for cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply.

The Commission entered no formal order at the time it published its findings, in order to permit the carriers voluntarily to modify their rules to conform to the findings. The carriers refused to modify their rules; whereupon the Commission, in a supplemental report, issued its order directed against the respondents (all common carrier railroads in the United States) requiring them to establish by October 1, 1930, car hire settlement rules which should provide (R. 99–100):

> (1) That the same daily car rental shall be paid to common-carrier nonsubscribers as respondents contemporaneously pay to subscribers to the per diem rules agreement of the American Railway Association, for the use of general-service freight cars.
>
> (2) That similar reclaim allowances shall be made to nonsubscribers as to subscribers of the per diem rules agreement, in connection with cars handled in terminal switching service, as the latter term is defined by the switching reclaim rules of the American Railway Association.
>
> (3) That short-line railroads which are less than 100 miles in length, and which return railroad-owned equipment to the road from which received, shall not be required to report per diem accruals to numerous car owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement.
>
> (4) That common-carrier railroads which interchange freight cars with more than one

subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, shall make car-hire settlements direct with car owners in accordance with the per diem rules.

(5) That common-carrier railroads outside switching districts, other than those referred to in paragraph 4 hereof, shall pay per diem to connecting carriers on railroad-owned freight cars after deducting an average of two days free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, except that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply.

Appellants' suit attacks paragraphs 2, 3, and 5 of this order. The specially constituted three-judge District Court unanimously adopted the findings of the Commission as its own and found that the Commission's order was in all respects supported by evidence. (R. 1169–1173.) It concluded that the order was as a matter of law not unreasonable, discriminatory, or confiscatory and dismissed the petition,

but without prejudice to petitioners to apply to the Commission at any time for a modification of the order when and if experience demonstrates that such order is working an

injury to petitioners, or any of them, or unfair results are following its application. (R. 1173.)

From the decree dismissing the petition, appellants appealed to this Court.

SUMMARY OF ARGUMENT

Paragraph 14 of Section 1 of the Interstate Commerce Act authorizes the Commission to establish reasonable car hire regulations and to fix proper car hire compensation. Paragraph 1 of the Commission's order in this case directs the payment of the same car rental to nonsubscribers as to subscribers, and paragraph 2 requires that similar switching reclaim allowances shall be made to nonsubscribers as to subscribers. The effect of these two paragraphs is to remove the discrimination existing under the per diem rules whereby cars of nonsubscribers were rented on a mileage basis and cars of subscribers on a per diem basis, and whereby switching reclaims allowed to subscribers were forbidden to nonsubscribers. In removing this discrimination the Commission was not required to give appellants an election between abandoning switching reclaims and extending them to all, since the authority of the Commission is not merely to remove discrimination, but affirmatively to establish reasonable rules.

The language and purpose of the Commission's order clearly indicate that nonsubscribers are required to allow switching reclaims to subscribers.

The manifest object of the order in this respect is to establish uniformity and equality of treatment as between subscribers and nonsubscribers.

Paragraph 3 of the order provides that short lines less than 100 miles in length which return freight equipment to the road from which received shall be attached to their connecting carriers for the purpose of car-hire settlement. Paragraph 3 thus requires subscribers to treat these short lines just as nonsubscribers are required to be dealt with under Rule 6 (b) of the per diem code. The effect of this paragraph of the order is to relieve these short lines of the burden of keeping small accounts with the countless car owners of the country. No substantial burden, if any, is imposed on any other class of railroad; and the saving in accounting expense to the railroad system as a whole may amounting to $500,000 a month. Paragraph 3 would seem therefore to be reasonable.

Paragraph 5 of the Commission's order requires that short lines referred to in paragraph 3 (other than switching lines) be granted two days' free time on all loaded freight cars interchanged with them, and totally exempts them from the payment of car hire on cars received for return loading with coal from coal mines which are customarily dependent upon the connecting trunk lines for car supply. Paragraphs 5 and 3 taken together allocate to the trunk line connections part of the cost to the short lines of the free time granted to shippers and consignees under the National Demurrage Rules. Par-

agraph 14 of Section 1 of the Act does not indicate the considerations which are to govern the distribution of car-hire costs, thus leaving it to the Commission upon investigation to determine the question. *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273. The Commission found that short lines were essentially feeders to their trunk line connections. They perform principally only terminal services and receive a small proportion of the line haul, while cars remain upon their tracks a disproportionate length of time. The Commission can not be said to have acted arbitrarily in giving consideration to this relationship and to the nature of the services performed by each of the parties thereto, and in deciding that by virtue of these facts the trunk lines should, to some extent, relieve their feeders of the cost of the free-time allowances made to shippers and consignees under the Demurrage Rules. Further support for the Commission's determination that free-time allowances to short lines are both proper and necessary is found in the history of the operation of the per diem rules.

ARGUMENT

THE ORDER OF THE COMMISSION IS SUPPORTED BY EVIDENCE AND IS NOT UNREASONABLE, DISCRIMINATORY, OR CONFISCATORY

Paragraph 14 of Section 1 of the Interstate Commerce Act (*supra*, p. 4), authorizes the Commission, after hearing, to establish reasonable rules,

regulations, and practices with respect to car service by railroads subject to the Act, including the compensation to be paid for the use of equipment not owned by the road using it. No question is raised here as to the constitutionality of the grant of power involved in this section of the Act, nor is it suggested that the Commission did not act within the general scope of its statutory authority. Appellants' contention (brief, pp. 47–48) is that Paragraphs 2, 3 and 5 of the Commission's order confiscate their property without due process and are so arbitrary, unreasonable, and unsupported by evidence as to transcend the limits of regulation.

Paragraph 1 of the Commission's order requires the payment of the same per diem rate on all cars regardless of whether or not their owners are subscribers to the per diem agreement. (R. 99.) Appellants do not attack this paragraph of the order.

Paragraph 2 of the Commission's order requires that similar switching reclaim allowances be made to nonsubscribers as to subscribers. (R. 99.) The testimony is unanimous that revenues from switching services are inadequate to cover the car-hire costs of carriers performing such service, and that reclaim allowances are not only desirable but necessary. (R. 150, 161, 710, 742, 909, 926–927, 929.) A witness representing appellants and other trunk line members of the A. R. A. (R. 207) testified that "the purpose of reclaim is to make the switching line whole in per diem which it pays on cars switched for a road haul carrier, on the theory

that the switching road is acting as a delivering carrier for the trunk line." (R. 910.) The necessity of furnishing an incentive to persuade carriers to subscribe to the per diem agreement is urged as justifying the denial of switching reclaims to nonsubscribers. But this consideration should not, and certainly need not, govern the Commission in establishing reasonable car-hire rules under the authority conferred upon it by paragraph 14 of Section 1 of the Act.

Appellants contend that if the failure to allow switching reclaims to nonsubscribers is discriminatory, they must be permitted to elect to extend the practice to all or eliminate it as to all. Three answers to this contention suggest themselves: First, the authority of the Commission is not limited to the removal of discrimination, but extends to the affirmative establishment of reasonable rules. Secondly, the order seems to permit an election. Paragraph 2 requires "that similar reclaim allowances shall be made to nonsubscribers as to subscribers." (R. 99.) Only equality of treatment is prescribed; no reclaim allowances need be paid at all. Thirdly, there is no likelihood that appellants seriously want the privilege of abandoning switching reclaims, in view of the fact that the practice is generally approved and regarded as necessary. (*Supra*, p. 20.)

Appellants construe the order as not requiring nonsubscribers to allow switching reclaims to subscribers. We submit that this imposes a technical

construction upon the language of the order not warranted by the record or the findings of the Commission. The Commission's obvious purpose was to place nonsubscribers on an equal footing with subscribers. The order is directed against all the common-carrier railroads in the United States, including both subscribers and nonsubscribers. The requirement that "similar reclaim allowances shall be made to nonsubscribers as to subscribers" can only mean that nonsubscribers and subscribers are to be treated alike. And even if the order could be construed as not affirmatively requiring nonsubscribers to pay switching reclaim allowances to subscribers, the short lines in this proceeding did not seek preferential treatment in the matter of switching reclaim allowances; they sought merely equality of treatment, and it is not to be supposed that they will refuse to allow switching reclaims to subscribers. The order in any event does not prevent appellants and the other subscribers from modifying the per diem rules so as to require nonsubscribers to pay such allowances to the subscribers. Since appellants can themselves cure the defect which they allege in the Commission's order, they are not in a position to challenge the order on this ground.

Paragraph 4 of the Commission's order in effect approves the method of making car hire settlements provided for by the per diem code, when applied to roads more than 100 miles in length, or to shorter roads which interchange equipment with

more than one subscriber connection. (R. 100.) All other roads, namely, short lines less than 100 miles in length which return cars to the subscriber road from which received, are dealt with in paragraphs 3 and 5. These roads will be hereinafter described as "short lines."

Paragraph 3 of the order provides that "short lines" shall not be required to report per diem accruals to the numerous car owners throughout the country but shall be attached to their connecting carriers for the purpose of car hire settlement. (R. 100.) As previously stated, under the per diem rules each subscriber accounts directly to the owner for the cars which it uses. (Rules 10, 11, 12, *supra*, pp. 10–11; R. 166–67.) On the other hand, under per diem rule 6 (a), when a freight car is interchanged by a subscriber with a nonsubscriber, the delivering subscriber continues responsible to the car owner for the per diem accruing while the car is in possession of the nonsubscriber, and rule 6 (b) requires the latter to pay its per diem to its subscriber connection. (*Supra*, p. 12; R. 195.) Paragraph 3 of the Commission's order therefore prescribes the same method of car-hire accounting for all "short lines" which the per diem code prescribes for nonsubscribers. Thus paragraph 3, except in so far as it includes "short line" subscribers, merely compels the trunk lines to do what they are already doing voluntarily.

Under Paragraph 3 "short lines" are required to account only to their trunk-line connections. The

latter are not required to keep special accounts with car owners for their "short-line" connections, but will include in their own reports to car owners the additional time that cars are held by their "short-line" connections. Trunk lines are the principal car owners (*supra*, p. 9), and paragraph 3 relieves them of receiving per diem reports from, and carrying accounts and making settlements with, the numerous "short-lines" (other than those with which they connect) over whose tracks their cars may pass. (R. 167.) Relief from the expense of this accounting may well offset the expense imposed upon them of having to account to other carriers for the car rental of their "short-line" connections. (R. 160, 167, 252, 253.) At least one witness was of the opinion that trunk lines would incur no additional burden under paragraph 3. (R. 825.) The same witness estimated that by permitting short lines to settle for car hire through their connections, $500,000 would be saved to the railroad system as a whole each month. (R. 825.) Even the witness who represented all the trunk-line members of the A. R. A. testified that "it would be desirable for short lines close to the ragged edge and having only one connection, to settle with their connecting line if a bond was given." (R. 219.) The chairman of the A. R. A. committee which drafted the original per diem code testified (R. 155):

> It would be practicable for short lines—take a stub-end feeder of say less than 25 miles—

> having only one connection to make settlement on all cars with its immediate connection, rather than with different owners, and I believe it is done. It is quite a job to settle per diem on even a small road at the end of the month, because of the large number of car owners.

Representatives of one short line after another testified to the enormous burden involved in setting up a car accounting office for the sole purpose of keeping small car hire accounts with all the countless car owners in the country. (R. 170, 511, 648, 651, 662, 667, 733, 745, 756.) Some short lines were compelled to cancel their subscriptions to the per diem agreement, and others had to refrain from subscribing in the first place, to avoid the cost of accounting directly to car owners. (R. 660, 715, 711, 712, 717.) It would seem to follow, therefore, that paragraph 3 of the order is supported by the evidence, and is not only not unreasonable, but involves a commendable plan calculated to benefit the railroad system as a whole. The purpose of paragraph 3 is not to benefit the short lines at the expense of the trunk lines, but to promote the public interest by obtaining economical transportation costs without imposing any serious burden on any class of carrier.

Paragraph 5 of the Commission's order provides, in effect, that the "short lines" referred to in paragraph 3 (excluding switching roads, which receive switching reclaim allowances under paragraph 2

of the order) shall be accorded an average of two days' free time on each loaded freight car interchanged, and totally exempts those lines from payment of car hire on cars received for return loading with coal from coal mines which are customarily dependent upon the connecting trunk lines for car supply. (R. 100.) Since paragraph 3 requires trunk lines to account for all the time cars are held both by themselves and their connecting short lines, with no free time allowances corresponding to those in paragraph 5, appellants complain that the trunk lines are made to assume a portion of the car hire expense of their short line connections. They allege that this constitutes an unconstitutional taking of their property. *Louisville & Nashville Railroad Company* v. *Central Stock Yards Company*, 212 U. S. 132.

Paragraph 14 of Section 1 of the Act does not specify the considerations which should govern the Commission in establishing reasonable car-hire rules. The Act, therefore, makes it a duty of the Commission to exercise its best judgment in determining the administrative questions involved. *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 42, 35; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273.

At the hearings before the Commission the short lines urged the Commission to consider the fact that their earnings from local rates or divisions of joint rates can not stand the absorption of all

the car hire required to be paid by them under the per diem code. (R. 689, 692–693, 43.) They explained that their car-hire costs bear an abnormal ratio to their total revenue and on particular hauls exceed the total revenue earned. (R. 689, 708, 717, 723, 801, 806, 938.) Car-hire costs, however, are not generally considered in fixing divisions of joint rates. *New England Divisions Case,* 62 I. C. C. 513, 538. And many railroads consider the questions of car hire and divisions of joint rates as separate and distinct. (R. 220, 751, 807.) The Commission, therefore, with the approval of counsel representing appellants, ruled that testimony relative to divisions was irrelevant. (R. 829, 912, 933.)

Another contention of the short lines was that a distinction must be made between car ownership and car use; that, regardless of the ownership of cars, they are used by the short lines and their trunk-line connections jointly; and that the car-hire costs incurred in the joint use of cars might reasonably be distributed between the participating railroads, with proper attention being paid to the character of each of the roads and the nature of the services performed by each. (R. 655, 680, 687, 693, 724, 749.) It is substantially this view that was adopted by the Commission.

"Short lines" are essentially "feeder" lines to their trunk-line connections. (R. 739, 801, 35.) Built for the purpose of connecting particular com-

munities or industries with the trunk lines, they act as delivering carriers for the latter, performing principally terminal services. (R. 659, 676, 679, 680, 689, 35.) They receive cars from their trunk-line connections, whether empties for loading or loaded cars for unloading, in wholesale quantities, and perform the switching necessary for making retail deliveries and collections, and returning cars to the trunk lines in wholesale lots, loaded cars being returned ready to move on.

"Short lines" are often required to bill freight through to destination and to perform other incidental terminal duties such as spotting, weighing, loading, and reloading when necessary. (R. 676, 689–690.) Traffic over "short lines" may move all or practically all one way, either inbound or outbound, the cars being required to go empty, bringing in no revenue in the opposite direction. (R. 758, 772, 961.) Due to the considerable amount of time required for the performance of terminal duties, cars are likely to remain on the tracks of "short lines" a disproportionate length of time. (R. 35.) Trunk lines, on the other hand, obtain by far the greater proportion of the line haul. (R. 774, 807.)

Under the National Demurrage Rules shippers and consignees are allowed two days' free time for loading and unloading and added free time when Sundays or holidays intervene or when stormy weather prevents the handling of particular commodities. (R. 156, 157, 687, 728, 733, 755.) Under

the demurrage rules, also, railroads do not collect any demurrage on coal cars held on mine sidings upon the theory that in times of car shortage the supply of coal cars is better regulated by car distribution rules than by demurrage charges. (R. 155, 645, 790–792, 794, 804, 814.) In fact, the Commission has forbidden the collection of demurrage charges by short lines on cars held on mine sidings. *Demurrage on Coal and Coke,* 102 I. C. C. 554. The road allowing the free time provided for under the demurrage rules must, nevertheless, under the per diem rules, pay the full per diem on cars not owned by it. In view of the character of the "short lines", the nature of their relationship to their trunk line connections and of the services performed by each, the Commission found that a proper apportionment of the car hire costs incurred upon cars used by them jointly, will be obtained if the trunk lines relieve short lines to some extent of the cost of the free time allowed by the demurrage rules.

The finding of the Commission that car owners are entitled to $1.00 per day for the use of their cars is not inconsistent with its determination, in paragraph 5 of the order, of the proper apportionment of car hire cost among joint car users. Appellants point also to the duty of common carriers to furnish an adequate supply of cars in which to haul their traffic, but appellants also concede (brief, p. 48) that it is their duty to permit the use of their cars by other carriers. Section 1 (12) of the Act (*supra,* p. 3) provides:

> It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines customarily dependant upon it for car supply.

Since the cars of other carriers may be properly used by "short lines," it becomes the duty of the Commission equitably to apportion the cost of the use of such equipment among the carriers parties to the transportation.

We have thus far regarded the question of allowance of free time to short lines as a novel one. In fact, the question is as old as car hire itself; and the whole history of car-hire settlement demonstrates that allowing free time to short lines is not unreasonable. Prior to the adoption of the per diem code in 1902 the short lines paid little, if any, car hire. (R. 157.) The change from the mileage to the per diem basis of determining car-hire charges was radical. (*Supra,* p. 7; R. 146–147.) Complaints against the change came equally from short lines and from trunk lines doing a switching business. (R. 146.) The switching reclaim allowance was conceived to conciliate the trunk lines whose cooperation was necessary to the successful adoption of the per diem code. (*Supra,* 11; R. 142, 150, 151.) But the switching reclaim rules apply only to switching done within recognized switching districts for a switching charge. (R. 210.) Only trunk lines generally fall within that classification.

(R. 163.) Short lines outside of switching districts which receive divisions of joint rates perform substantially the same service as the switching roads within such districts, and it was testified, and the Commission found, that the distinction between the two was arbitrary and the result of compromise. (R. 150, 160, 163, 164, 171, 252.)

The needs of short lines were given little consideration except that the per diem code left subscribers free to make special arrangements with short lines (R. 144, 145, 146, 160, 162, 163, 164) and it became customary to allow many lines outside of switching districts two days or more free time. (R. 987.) But since 1922, when Rule 6 (b) was adopted, free time and reclaim allowances to nonsubscribers have been prohibited. (R. 1068, Code p. 12; *supra*, p. 12.)

Despite the mandatory language of the rule, all subscribers have not complied with it. Several illustrations of short lines which settle for car hire on a basis other than that required by Rule 6 (b) are contained in the report of the Commission. (R. 35–39.) The following statement taken from the Commission's report (R. 39) shows the number of nonsubscriber railroads outside of Chicago which interchange traffic with each of the trunk lines referred to therein, the number which pay straight per diem, and the number which settle on some other basis.

TABLE

Trunk line	Nonsubscriber connections		
	Total	Which pay straight per diem	Which settle on some other basis
Burlington	18	2	16
Chesapeake & Ohio	10	5	5
Great Northern	21	0	21
L. & N.	10	2	8
Missouri Pacific	20	3	17
New Haven	8	5	3
North Western	9	6	3
Pennsylvania	55	6	49
Soo Line	12	4	8
Southern	27	20	7
Southern Pacific (Pacific Lines)	46	24	22
Southern Pacific (Texas and Louisiana)	14	10	4
St. L. S. W.	7	3	4
Union Pacific	15	6	9
B. & O.[1]			

[1] Exact number not given.

Appellants (brief pp. 28, 29) regard this table as misleading because it includes 67 industrial roads among the nonsubscriber roads which settle upon other than the straight per diem basis, industrial roads being expressly exempted from rule 6 (b). But the order of the Commission does not distinguish between industrial and other short lines. (*Supra*, p. 15.) And even eliminating the 67 industrial roads, the table still shows that 14 trunk lines violate rule 6 (b) with respect to 109 out of a total of 272 nonsubscriber connections. It should be noted that the Great Northern has special arrangements with every one of its nonsubscriber connections. (R. 860.) It was testified that the Missouri Pacific enters into special arrangements with all nonsubscriber connections which insist thereon. (R. 865.) The Burlington refused to comply with Rule 6 (b) when it learned

that its nonsubscriber connections could not afford to pay the full per diem without free time. (R. 941.) Other subscribers to the per diem code would be glad to make allowances in violation of Rule 6 (b), but feel constrained by the rule. (R. 677, 686, 696.)

Out of 651 nonsubscribers to the code, 123 settle for car hire on a basis other than that provided for in the code. (R. 196.) And out of 185 short line nonsubscribers not industrially owned (the latter being excepted from Rule 6 (b)) 41 (or 22 per cent) make car hire settlements contrary to the rule. (R. 890, 1039.) Those subscribers which now operate under favorable arrangements face the constant threat that Rule 6 (b) will suddenly be enforced against them.

The propriety and necessity of some allowance by trunk lines to their short line connections for car hire costs has thus always been recognized. During the period of Federal control of railroads the Railroad Administration allowed two days free time to a great many short line roads. (R. 647, 714, 717, 759.) It is not material that the waiver of certain claims against the Railroad Administration constituted technical consideration for this allowance. (R. 990.) The fact is that the need for allowing short lines free time was recognized. The order of the Commission in this case finally establishes a uniform requirement as to free time applicable to all short lines less than 100 miles in length which return cars to the roads from which

received, and uniformity has been said to be the paramount purpose of the Act to Regulate Commerce. *Great Northern Railway Company* v. *Merchants Elevator Company,* 259 U. S. 285, 290. The A. R. A. recognizes that uniformity is desirable, but it believes that uniformity should be obtained by the strict enforcement of rule 6. (b). (R. 196.)

In *Atlantic Coast Line Railroad Co.* v. *Riverside Mills,* 219 U. S. 186, involving the validity of the Carmack amendment, this Court said (p. 206):

> But it is said that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

So here, the "feeder" relationship between "short lines" and their trunk line connections justifies an allocation of car-hire costs between them, not on the arbitrary basis of the number of days that cars happen to remain on the tracks of each, but according to the substantive services performed by each party to the relationship. We submit that the determination of the Commission is not so arbitrary or unreasonable as to transcend the power conferred upon it to regulate car-hire settlement. *United States* v. *New River Company,* 265 U. S. 533,

542. On the contrary, the Commission's order would seem to be in full accord with the dominant policy of the Transportation Act, 1920, which this Court has repeatedly approved, of securing for the United States an adequate, unified, and economical railroad system. *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456; *Assigned Car Cases*, 274 U. S. 564, and *New England Divisions Case*, 261 U. S. 184.

Appellants' attack upon the classification involved in paragraphs 2 to 5, inclusive, of the Commission's order (brief p. 96) appears on its face to be without merit and trivial. At the risk of repetition, the classes created by the Commission's order are restated here. Paragraph 2 retains the classification of switching carriers provided for in the per diem code and merely abolishes the distinction, found by the Commission to be unreasonable, between subscribers and nonsubscribers. Under paragraphs 3, 4, and 5, common carriers more than 100 miles in length are required to make car-hire settlements in accordance with the provisions of the per diem rules. The 100-mile classification is similar to that employed by the A. R. A. in permitting only roads 100 miles or more in length to become members (as distinguished from associate members) and to have the right to vote upon the adoption or revision of per diem rules. (*Supra*, p. 8.) A separate classification is made of lines less than 100 miles in length which, having

one or more connections, are able to and do return all interchanged freight equipment to the road from which received. The basis of this classification is the obvious fact that unless freight equipment is returned to the road from which received, settlements with connecting carriers provided for in paragraph 3, or the free-time allowances provided for in the paragraph 5, could not be practically accomplished. Paragraph 5 is further limited to railroads outside switching districts, since free time to roads in switching districts is governed by switching reclaim allowances.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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